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Official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime

Note by the Secretariat

I. Introduction

1. At the ninth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the Chairman requested the Secretariat to prepare a document outlining the structure of the official records of the negotiations (the *travaux préparatoires*) and containing all the notes intended for the official records on which the Ad Hoc Committee had already agreed and which currently appeared as footnotes to the text of the draft Convention. The present note is submitted to the Ad Hoc Committee at its tenth session pursuant to that request.

II. Background

2. *Travaux préparatoires* are the records of the negotiations preceding the conclusion of a treaty. As such, they may consist of the minutes of the plenary meetings and the comments of the conference or other body that adopted the treaty or the successive drafts of the treaty, including the various proposals on record.[1] In the case of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,[2]

[1] For more details, see Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed., 1996.

[2] See *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. I (United Nations publication, Sales No. E.94.XI.5).

the Official Records[3] comprise two volumes of records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, held in Vienna from 25 November to 20 December 1988. Volume I includes the preparatory work of the Conference; the Conference documents on organizational matters; the main Conference documents; the Final Act and resolutions adopted by the Conference; and the final text of the Convention. Volume II contains the summary records of the plenary meetings of the Conference and the summary records of the meetings of Committee I and Committee II of the Conference.

3. In addition to being a compilation of the documentation that leads to the adoption of a treaty, *travaux préparatoires* are a supplementary source of interpretation of a treaty. Primacy in interpretation value is invariably accorded to the text of the treaty. Article 31 of the 1969 Vienna Convention on the Law of Treaties[4] establishes the general rule of interpretation of a treaty. Paragraph 1 of that article provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Vienna Convention goes on to provide, in article 32, that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> "(a) Leaves the meaning ambiguous or obscure; or
>
> "(b) Leads to a result which is manifestly absurd or unreasonable."

Naturally, the value of preparatory work in shedding light on the meaning of a treaty will vary from case to case. However, where a treaty has been negotiated with thorough preparation and full deliberation and an efficient and complete record has been kept, the value of the *travaux préparatoires* may be significant. The International Court of Justice and its predecessor have frequently affirmed the usefulness of recourse to *travaux préparatoires*.[5]

III. Outline of the official records of the negotiation of the United Nations Convention against Transnational Organized Crime

4. In its resolution 54/126 of 17 December 1999, the General Assembly decided that the Ad Hoc Committee would submit the final text of the Convention and the protocols thereto to the Assembly, which is the body responsible for the adoption of those instruments. The Ad Hoc Committee is thus expected to carry out all the negotiations necessary for the finalization of the draft texts. No conference of plenipotentiaries or other similar mechanism is foreseen for the adoption of the Convention and the Protocols thereto.

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[3] United Nations publication, Sales No. E.94.XI.5.

[4] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[5] See *Oppenheim's International Law*, *op. cit.*

5. Consequently, the official records (*travaux préparatoires*) of the negotiation of the Convention will track the progress of the negotiations in the Ad Hoc Committee, through the evolution of the texts that the Ad Hoc Committee will submit to the General Assembly for its consideration and action. Such official records will include the preparatory work carried out by (a) the open-ended intergovernmental group of experts, established pursuant to General Assembly resolution 52/85 of 12 December 1997, at its meeting in Warsaw from 2 to 6 February 1998; (b) the Commission on Crime Prevention and Criminal Justice at its annual sessions, to the extent that they have a bearing on the negotiation process; and (c) the informal preparatory meeting of the Ad Hoc Committee, held in Buenos Aires from 28 August to 3 September 1998. The official records will contain the successive revisions of the texts and the pertinent proposals and contributions of Governments on record. Finally, the official records will contain the interpretative notes on which the Ad Hoc Committee has agreed or will agree until the conclusion of the negotiations. The interpretative notes on which the Ad Hoc Committee has already agreed are reproduced below (paras. 7-34). The notes were previously contained in footnotes to the text of the provisions of the draft Convention to which they applied. The interpretative notes would also form the basis for a subsequent commentary of the Convention and the Protocols thereto, should one be requested in future.

6. The Ad Hoc Committee should bear in mind that the compilation of the official records is a time-consuming and labour-intensive exercise. The Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances were published in 1994, six years after the adoption of the Convention. In view of its present strength and workload, the Secretariat estimates that the preparation of the official records of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto would require no less than 12 work-months after the adoption of the texts by the General Assembly.

IV. Interpretative notes on the draft Convention agreed on by the Ad Hoc Committee

Article 2 *bis*

Paragraph (a)

7. The *travaux préparatoires* will indicate that the inclusion of a specific number of persons would not prejudice the rights of States Parties pursuant to article 23 *ter*, paragraph 2.

8. The *travaux préparatoires* should indicate that the words "in order to obtain, directly or indirectly, a financial or other material benefit" should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.

Article 4

Paragraphs 1 (a) and (b)

9. The *travaux préparatoires* will show that the words "concealing or disguising" should be understood to include preventing the discovery of the illicit origins of property.

Article 4

Paragraph 2 (b)

10. The *travaux préparatoires* will include a note to the effect that the phrase "associated with organized criminal groups" is intended to indicate criminal activity of the type in which organized criminal groups engage.

Article 4

Paragraph 2 (e)

11. In the *travaux préparatoires* it will be stated that subparagraph (e) takes into account legal principles of several States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted. Those States confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request was based on a money-laundering offence the predicate offence of which was committed by the same person.

Article 4 *ter*

Paragraph 4

12. The *travaux préparatoires* should indicate that the concept of a person who provides a public service applies to particular legal systems and that the incorporation of this concept into the definition is intended to facilitate cooperation between States Parties with that concept in their legal systems.

Article 7

13. The *travaux préparatoires* should indicate that the interpretation of article 7 takes into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. Furthermore, the *travaux préparatoires* should indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or state immunity, including that of international organizations.

Paragraph 1 (b)

14. The *travaux préparatoires* should indicate that the words "used in or destined for use in" are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime.

Paragraph 5

15. The *travaux préparatoires* should indicate that the words "other benefits" are intended to encompass material benefits, as well as legal rights and interests of an enforceable nature, that are subject to confiscation.

Article 7 *ter*

16. The *travaux préparatoires* should indicate that, when feasible, States Parties would examine whether it would be appropriate, in conformity with individual guarantees embodied in their domestic law, to use confiscated assets to cover the costs of assistance provided pursuant to article 18, paragraph 2.

Article 9

Paragraph 2 (a)

17. The *travaux préparatoires* should reflect the understanding that States Parties should take into consideration the need to extend possible protection that might stem from the establishment of jurisdiction to stateless persons who might be habitual or permanent residents in their countries.

Paragraph 5

18. The *travaux préparatoires* should indicate that an example of how useful coordination between States Parties would be was the need to ensure that time-sensitive evidence was not lost.

Article 10

Paragraph 2

19. The *travaux préparatoires* should indicate that the purpose of paragraph 2 is to serve as an instrument for countries wishing to avail themselves of the facility it provides. It is not intended to broaden the scope of the article unduly.

Paragraph 8

20. The *travaux préparatoires* should indicate that the appropriate equivalent term in the Arabic language of the word "sex" is that referring to male and female.

21. The *travaux préparatoires* should indicate that at the informal consultations held during the eighth session of the Ad Hoc Committee, the delegation of Italy proposed the insertion after paragraph 8 of the following provision:

> "Without prejudice to the use of other grounds for refusal, the requested State may refuse to extradite on the ground that a decision has been issued *in absentia* only if it is not proved that the case has been tried with the same guarantees as when a defendant is present and he or she, having knowledge of the trial, has deliberately avoided being arrested or has deliberately failed to appear at the trial. However, when such proof is not given, extradition may not be refused if the requesting State gives assurance, deemed satisfactory by the requested State, that the person whose extradition is sought shall be entitled to a new trial protecting his or her rights of defence."

In the discussion that followed, several delegations expressed serious concerns about whether this provision would be compatible with the fundamental principles of their legal systems. The delegation of Italy withdrew its proposal at the ninth session of the Ad Hoc Committee.

Paragraph 9

22. The *travaux préparatoires* should indicate that this paragraph should not be interpreted as prejudicing in any way the fundamental legal rights of the defendant.

23. The *travaux préparatoires* should indicate that one example of implementation of this paragraph would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State Party for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State Party and the consent of the person in question. The consent, which should be expressed voluntarily and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself.

Article 17 *bis*

Subparagraph (a)

24. The *travaux préparatoires* should indicate that the term "proceeding' is intended to cover all official governmental proceedings, which may include the pre-trial stage of a case.

25. The *travaux préparatoires* should indicate that it is not intended to cover cases where a person has the right not to give evidence and an undue advantage is provided for the exercise of that right.

Article 18 *bis*

26. The *travaux préparatoires* should indicate that, while the purpose of this article is to concentrate on the physical protection of victims, the Ad Hoc Committee was cognizant of the need for protection of the rights of individuals as accorded under applicable international law, also in the context of the provision of article 24, paragraph 1, of the Convention.

Article 18 *ter*

Paragraph 2

27. The *travaux préparatoires* should indicate that the term "mitigating punishment" might include not only prescribed but also de facto mitigation of punishment.

Article 19

Paragraph 2 (c)

28. The *travaux préparatoires* should indicate that the role and functions of these officials will be determined by the State Party in whose territory the operation is to take place.

Article 20

Paragraph 2

29. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including the International Criminal Police Organization (Interpol), the Customs Cooperation Council (also called the World Customs Organization) and the European Police Office (Europol).

Article 21

Paragraph 4

30. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including Interpol, the World Customs Organization and Europol.

Article 22

Paragraph 3

31. The *travaux préparatoires* should indicate that, in line with constitutional principles of equality, there is no distinction intended between persons convicted of offences covered by the Convention and persons convicted of other offences.

Article 23

Paragraph 3

32. The *travaux préparatoires* should state that, in discharging its tasks, the Conference of the Parties should give due regard to the need to preserve the confidentiality of certain information, given the nature of the fight against transnational organized crime.

Paragraph 5

33. The *travaux préparatoires* should show that the Conference of the Parties should take into account the need to foresee some regularity in the provision of the information. The *travaux préparatoires* should also indicate that the term "administrative measures" is understood to be broad and to include information about the extent to which legislation, policies and other relevant measures have been implemented.

Article 25

Paragraph 1

34. The *travaux préparatoires* should state that the term "negotiations" is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.